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In the Supreme Court of the United States

OCTOBER TERM, 1982

BETHLEHEM STEEL CORPORATION
AND
INSURANCE COMPANY OF NORTH AMERICA,
APPELLANTS,

v.

RHODE ISLAND TURNPIKE
AND BRIDGE AUTHORITY,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

Jurisdictional Statement.

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Question Presented.

Whether retroactive application of Chapter 54, Section 1 of the 1981 Public Laws of Rhode Island (amending Rhode Island General Laws § 9-21-10), increasing the rate of prejudgment interest in civil actions, to a case (i) in which all trial proceedings, except the filing of the trial court's written decision, had terminated before the effective date of the statute, so that the statute's applicability turned solely on the happenstance that a decision was not made by the trial court before the statute's effective date, and (ii) with respect to which the essential issue of liability was finally resolved several years before the effective date of the statute, violates rights securerd by the Contract Clause of Article I of the United States Constitution or the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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Constitutional Provisions.

U.S. Const. Art. I, § 10 *passim*

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1981 Public Laws of the State of Rhode Island, Chapter 54, Section 1 *passim*

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BETHLEHEM STEEL CORPORATION
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v.

RHODE ISLAND TURNPIKE
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APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

Jurisdictional Statement.

Bethlehem Steel Corporation and Insurance Company of North America, appellants, appeal from the final decision of the Supreme Court of Rhode Island, dated June 4, 1982, holding that Chapter 54, Section 1 of the 1981 Public Laws of the State of Rhode Island, amending Rhode Island General Laws of 1956 (1969 Reenactment) § 9-21-10, is not violative of appellants' right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is not violative of the proscription on state laws impairing the obligations of contracts contained in Article I, Section 10 of the United States Constitution.

Opinions Below.

The opinion of the Supreme Court of Rhode Island from which this appeal is taken, which appears in section IA of the appendix hereto, is reported at 446 A.2d 752 (1982). Previous opinions of the Supreme Court of Rhode Island in this case, which appear in sections IB and IC of the appendix[1] hereto, are reported at 119 R.I. 141, 379 A.2d 344 (1977) and at 415 A.2d 1295 (1980). The Opinions of the trial court in this case, the Superior Court of Rhode Island, Providence County, which heard the case without a jury, and the judgments entered thereon, are not reported. They are reprinted in the appendix hereto as follows: the Superior Court's Revised Decision filed June 26, 1981 is reprinted in section IIA of the appendix; the Superior Court's Judgment after Second Remand, entered September 2, 1981, as of June 30, 1981, is reprinted in section IIB of the appendix; the Superior Court's Supplemental Decision on Second Remand Relating to Computation of Interest, filed August 21, 1981, is reprinted in section IIC of the appendix; the Superior Court's Revised Decision after remand, issued March 15, 1979, is reprinted in section IIIA of the appendix; the Superior Court's Judgment After Remand, entered April 6, 1979, is reprinted in section IIIB of the appendix; the Superior Court's Decision, filed December 31, 1975, is reprinted in section IVA of the appendix; the Superior Court's Revised Judgment, entered January 30, 1976 is reprinted in section IVB of the appendix.

Jurisdiction.

The decision of the Supreme Court of Rhode Island from which this appeal is taken was issued June 4, 1982.

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[1] Due to the length of the Appendix it has been prepared and filed as a separate volume.

A notice of appeal to this Court was filed in the Supreme Court of Rhode Island on June 24, 1982, and is reprinted in section VA of the appendix hereto. A supplemental notice of appeal to this Court was filed in the Supreme Court of Rhode Island on July 23, 1982, and is reprinted in section VB of the appendix hereto. Copies of the notices of appeal were filed with the Superior Court of Rhode Island, Providence County.

This appeal is being docketed in this Court within ninety (90) days of the issuance of the decision below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional Provisions and Statutes Involved.

Contract Clause, Article 1, Section 10 of the United States Constitution:

> No State shall ... pass any ... Law impairing the Obligation of Contracts ...

Fourteenth Amendment, United States Constitution:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

Chapter 54, 1981 Public Laws of Rhode Island, Sections 1 and 3:

> AN ACT Relating to Interest rates on Judgments
>
> It is enacted by the General Assembly as follows:
>
> Section 1. Sections 9-21-8 and 9-21-10 of the General Laws in Chapter 9-21 entitled "Judgments, Orders and Decrees" are hereby amended to read as follows:
>
> 9-21-8. INTEREST ON JUDGMENT.—Every judgment for money shall draw interest *at the rate of twelve percent (12%) per annum* to the time of its discharge.
>
> 9-21-10. INTEREST IN CIVIL ACTIONS.—In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages, inter-

est at the rate of *twelve* per cent (*12%*) per annum thereon from the date the cause of action accrued which shall be included in the judgment entered therein. This section shall not apply until entry of judgment or to any (contractual) obligation where interest is already provided or as to any condemnation action.

Sec. 3. This act shall take effect upon its passage and shall be given retroactive as well as prospective effect and shall apply to all cases pending upon the effective date of this act.

Raising the Federal Question.

At the earliest stage in the proceedings below that Chapter 54, Section 1 of the 1981 Public Laws of Rhode Island became pertinent to this case, appellants challenged as unconstitutional the retroactive application of that statute to the full amount of the judgment in this case. In the first pleading filed after the effective date of the statute, Defendants' Objection to Plaintiff's Proposed Form of Judgment After Second Remand, filed July 31, 1981, appellants claimed that retroactive application of the statute to the full amount of the judgment after second remand would violate appellants' rights under the United States Constitution. This contention was not addressed in the Supplemental Decision Relating to Computation of Interest filed by the Superior Court of Rhode Island on August 21, 1981.

The constitutional claim was reasserted by appellants before the Supreme Court of Rhode Island on appeal from the Superior Court's Judgment After Second Remand. In their brief to the Supreme Court of Rhode Island (at pp. 30-31), appellants argued that the Superior Court's retroactive application of Chapter 54, Section 1 of the 1981 Public Laws of Rhode Island "impair[ed] defendants' rights and .. amount[ed] to a denial of due process in violation of the Con-

stitution of the United States...." The Supreme Court of Rhode Island, in its opinion issued June 4, 1982, rejected the appellants' constitutional claim (see opinion below, App. IA, page 9, 446 A.2d at 757).

Statement of the Case.

This case has its genesis in a contract executed on April 25, 1966, pursuant to which appellant Bethlehem Steel Corporation ("Bethlehem") agreed to perform certain work for appellee Rhode Island Turnpike and Bridge Authority (the "Authority") in connection with the construction of the steel superstructure of a suspension bridge connecting Newport, Rhode Island, with Jamestown, Rhode Island. In a complaint filed December 17, 1970, which commenced this civil action in the Superior Court of Rhode Island, Newport County (the matter was transferred on April 30, 1971 to the Superior Court, Providence County), the Authority claimed that Bethlehem had breached the contract by failing to prepare adequately the bridge surfaces to be painted, by failing to apply the paint in accordance with specifications, and by failing to do necessary remedial work. The Authority's demand for judgment, initially $2 million, was later increased to $6 million.

In its answer to the complaint, Bethlehem denied the Authority's allegations and filed a counterclaim, subsequently amended, against the Authority and its engineer, in which, among other matters, Bethlehem sought recovery of the unpaid contract balance of $804,996.55.

After years of extensive discovery, the case was tried without a jury beginning in January, 1974. The trial was concluded on December 18, 1974 and on December 31, 1975, the trial court rendered a decision in favor of the Authority, except for that portion of Bethlehem's counterclaim relating to the

balance due under the contract (App. IVA). Judgment based on the decision was entered on January 30, 1976 (App. IVB). The judgment required Bethlehem to pay $4,571,329.39 to the Authority.

Bethlehem appealed the trial court's judgment to the Supreme Court of Rhode Island. The Supreme Court of Rhode Island, in an Opinion filed August 11, 1977 (119 R.I. 141, 379 A.2d 344) (App. IB), affirmed the trial court's fundamental holding that Bethlehem had breached its contract with the Authority. While the Supreme Court remanded the case to the trial court for further consideration of certain issues related to the amount of damages, the principal issue being the credit to which Bethlehem was entitled for having painted the bridge, the basic issue in the case—whether Bethlehem had breached its contract with the Authority—was finally resolved in favor of the Authority. At the time of this final decision on the breach of contract issue, Rhode Island law provided for addition of prejudgment interest to judgments in civil actions at the rate of 8% from the date of accrual of the cause of action (App. VIB).

In the ensuing years, the parties continued to litigate certain narow issues relating to the amount of credit due Bethlehem for painting the bridge. In a revised decision dated March 15, 1979 (App. IIIA), following hearings on remand, the trial court found that Bethlehem was entitled to a credit of one fourth of the remedial painting costs incurred by the Authority. Both the Authority and Bethlehem appealed this decision, and the Supreme Court of Rhode Island issued another opinion on June 10, 1980 (415 A.2d 1295) (App. IC) sustaining the Authority's appeal and denying Bethlehem's appeal. The Court held, *inter alia*, that Bethlehem's credit should be "limited to 25 percent of the cost of actually applying the paint to the bridge's surface," and that Bethlehem was not entitled to a credit with respect to costs incurred by the

Authority in preparing the bridge for repainting. The case was again remanded to the trial court for further proceedings relating strictly to the amount of the credit to which Bethlehem was entitled for painting the bridge.

Hearings following this second remand were conducted in early 1981, and, after several delays, the hearings were concluded March 27, 1981. The trial court filed a Revised Decision on June 26, 1981 (App. IIA). In the interval, however, while the parties were awaiting the decision of the trial court concerning the issue involved on the second remand, the General Assembly of the State of Rhode Island enacted a statute (Chapter 54 of the 1981 Public Laws of Rhode Island), effective May 8, 1981, which amended Section 9-21-10 of the Rhode Island General Laws relating to prejudgment interest in civil actions by changing the rate from 8% to 12%.

Following the Superior Court's June 26, 1981 decision, the Authority submitted a form of judgment which included calculations of prejudgment interest at the twelve per cent rate on the various items of damages from their respective dates of accrual, commencing in 1970 and 1971, up through May 7, 1981 (i.e., the date next preceding the effective date of the statute) as well as for the period beyond that date. Bethlehem challenged the application of the 12% rate to periods of time before May 8, 1981, and memoranda concerning the applicability of the increased rate were submitted by both parties. Bethlehem's objection to such application, in which Bethlehem contended that retrospective application of the 12% rate would be unconstitutional, was overruled in a Supplemental Decision of the trial court filed August 21, 1982 (App. IIC). The Judgment After Second Remand was then entered on September 2, 1982 as of June 30, 1982 (App. IIB). The Court's retroactive application of the 12% prejudgment in-

terest rate to periods before May 8, 1981 resulted in an increase in the amount of Bethlehem's liability of nearly $1,000,000.[3]

In its appeal from this judgment, Bethlehem contended, *inter alia*, that the Superior Court's retroactive application of the 12% prejudgment interest rate denied it rights secured by the United States Constitution, including rights secured by the Due Process Clause of the Fourteenth Amendment.

In an opinion issued June 4, 1982 (App. IA), the Supreme Court of Rhode Island denied the appeals of both Bethlehem and the Authority, and affirmed the judgment of the Superior Court.

Bethlehem filed a notice of appeal to this Court with the Supreme Court of Rhode Island on June 24, 1982, and Bethlehem filed a supplemental notice of appeal to this Court with the Supreme Court of Rhode Island on July 23, 1982.

The Question is Substantial.

I. Introduction.

The question of the validity under the Due Process Clause and the Contract Clause of the United States Constitution of a state legislative enactment that retroactively alters a person's liability is a substantial question as to which the prior decisions of this Court fail to provide adequate guidance, and as to which there is substantial conflict among decisions of both state and federal courts. The substantiality of the question in the abstract is augmented by the factual circumstances of this case, where the retroactive application of a Rhode Island statute increasing the rate of prejudgment interest in

[3] The precise effect of applying the 12% rate from the date of accrual of the Authority's claims rather than applying the 8% rate to such claims until May 7, 1981, and a 12% rate thereafter, was to add approximately $928,596 to Bethlehem's liability to the Authority.

civil cases from 8% to 12% will, if permitted to stand, result in the addition of nearly one million dollars to the appellants' liability. This case, therefore, presents a cogent vehicle for this Court to provide guidance concerning the extent to which a State may, consistent with the Constitution, alter settled expectations created both by contract and by state law.

In its other dimension, this case presents the question of whether a state may, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, enact and enforce a statute that, as applied to a particular litigant, is capricious and wholly devoid of rationality. This question, while hardly novel, is nonetheless substantial in the sense that the values that underlie the Fourteenth Amendment are eroded whenever a state is permitted to enforce a statute that, as applied, is without reason or purpose. And again, the substantiality of the Due Process question is heightened by the enormity of the impact upon the appellants of the enforcement against them of the enactment in question.

The question presented is placed most sharply into focus by a brief review of the salient elements of the procedural history of this case. The complaint was filed in December, 1970. A lengthy trial of the merits of the case was conducted in 1974, with a judgment based thereon entered on January 30, 1976. The key features of that judgment fixing liability upon Bethlehem were sustained by the Rhode Island Supreme Court on August 11, 1977, and have never changed. Since that date, the basic issue in this lawsuit has been finally resolved, and the essential liability of Bethlehem for breach of contract has been fixed. Litigation following that date has simply involved adjustments to the amount of damages owed by Bethlehem to the Authority.

The final round of hearings before the Superior Court, which involved solely the amount of an adjustment to the damages figure, were concluded on March 27, 1981. If a decision had been made by the Superior Court within forty-one days after the close of the hearings, (*i.e.*, before May 8, 1981), then, under the reasoning of the courts below, prejudgment interest would have attached to the amount of the judgment at a rate of 8% from the date of accrual of the Authority's claims, because, until May 8, 1981, Rhode Island Law (Rhode Island General Laws § 9-21-10) provided for prejudgment interest in civil cases at the rate of 8%. Because of the happenstance that a decision was not made after the second remand until June 26, 1981, however, the Superior Court of Rhode Island applied a 12% rate not only from May 8, 1981 but rather to the entire amount of the judgment from the date of accrual of the Authority's cause of action. Bethlehem's liability, which in its essential nature was fixed in 1977, was thus increased by nearly one million dollars by virtue of the fact—both unforeseen and beyond Bethlehem's control—that a formal decision following the third round of hearings before the Superior Court was made after, and not before, May 8, 1981. Thus, Bethlehem, which since at least as early as August, 1977 had proceeded and relied upon the assumption that the outer limit of its liability was fixed in part by the 8% prejudgment interest rate then applicable, saw its liability increased by nearly a million dollars by the unpredictable vagary of the timing of the making of a decision in a case whose essential dimensions had been fixed years earlier by several previous decisions.

The unconstitutionality of the impact of these circumstances upon Bethlehem is best analyzed from two perspectives: First, the irrationality of Chapter 54, section 1 of the 1981

Public Laws of Rhode Island as applied in this case, constituting a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and, second, the upsetting of settled economic expectations that application of Chapter 54, section 1 of the 1981 Public Laws of Rhode Island to the entire judgment worked upon Bethlehem, constituting a violation of the Due Process Clause and, in addition, the Contract Clause of Article I, section 10 of the United States Constitution.

II. The Statute, As Applied, Is Irrational.

It is a firmly-settled principle of constitutional law that a law that achieves arbitrary and capricious results or is without a rational basis violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Chapter 54, Section 1 of the 1981 Public Laws of the State of Rhode Island, as applied in this case by the courts of the State of Rhode Island, is paradigmatic of a law that achieves arbitrary and capricious results. Under the application of the law endorsed by the courts below, the rate of prejudgment interest in this case turned on the date that the trial judge chose to file a written decision, even though all proceedings in the trial court (except for the filing of the decision) had concluded before the effective date of the statute increasing the rate of prejudgment interest and even though the essential contours of the liability imposed in the case were fixed nearly four years before the effective date of that statute.

In this case, if the trial judge's schedule had permitted him to reach a decision before May 8, 1981 (approximately six weeks after conclusion of hearings), the 8% rate would have applied and Bethlehem's liability would have been nearly one million dollars less than that ultimately imposed. Under the

lower courts' reasoning, if the trial court had reached a decision on May 6, the prejudgment interest rate applicable to the entire judgment from the date of accrual of the Authority's cause of action would have been 8%; if the decision had been reached on May 9 or thereafter, the applicable rate would have been 12%. For a matter of this magnitude to turn on the happenstance of the date of filing of a decision is the height of caprice.

The Supreme Judicial Court of Massachusetts, in *Porter v. Clerk of Superior Court*, 368 Mass. 116, 330 N.E.2d 206 (1975), recognized the arbitrariness and irrationality that would result if a statute increasing the rate of prejudgment interest were given fully retroactive effect (*i.e.*, if the increase were applied not only retroactively to cases pending on the effective date of such a statute from the effective date of the statute but rather to the full amount of a judgment rendered in such action from the date of accrual of the cause of action). The Supreme Judicial Court of Massachusetts wrote:

> In the past, in order to determine whether a statute was to be given retroactive effect, it was necessary to determine whether it affected substantive rights or was merely remedial or procedural.... However, in *City Council of Waltham v. Vinciullo*, Mass., 307 N.E.2d 316 (1974), we chose not to rely on the substantive-procedural distinction and instead attempted to formulate a more workable rule.
>
> *The rule we adopted has us look to the stage of the proceedings affected by the change and determine whether that stage has been completed on the effective date of the amendment.* If the point in the proceedings to which the statutory change is applicable has already passed, the proceedings are not subject to that change. If, on the other hand, that point has not yet been reached, the new provisions apply. This rule gives the broadest appli-

cation to legislatively mandated changes without subjecting each completed step in the litigation to the uncertainty of possible future legislative change. *Id.* at 171, 307 N.E.2d 316.

In applying *Vinciullo* to the instant case, we note that the statute in question does not apply to any particular stage of the proceedings. *The interest afforded by the statute is meant as compensation for delay, . . . and as such, it accrues daily. The finding or order for judgment merely makes this accrued interest payable. Thus, the point in the proceedings to which the statutory interest rate applies is passed each day, and the rate applicable on each day is that in effect at the time.*

"[T]his result is buttressed by considerations of fairness." *City Council of Waltham v. Vinciullo, supra,* ____ Mass. at ____, 307 N.E.2d at 320. *If we were to hold otherwise, unfair distinctions would abound. If we held the statute to be fully retroactive, an unfair distinction would be made as to cases begun ten years ago between verdicts on August 13 (six percent rate governs throughout) and those on August 15 (eight percent rate for entire period). Similarly, if we wholly denied retroactive effect, we would sanction unfair discrimination between actions begun on August 13 and those begun just two days later.* We do not believe such results were intended by the amendment to G.L. c. 231, § 6B, and we think our holding is consistent with the letter and spirit of both the amendment and our most recent decisions regarding retroactive application of statutes. Accordingly, we hold that the defendant clerk was correct, and that interest should be added at the six percent rate from the commencement of the action until August 14, 1974, and at the eight percent rate thereafter.

330 N.E.2d at 208-09 (Emphasis added).

The caprice of a retroactive application of a statute increasing the rate of prejudgment interest is even more glaring in this case than in the *Porter* case for two reasons. First, unlike in *Porter*, all trial proceedings in this case were completed before the effective date of the statute, so that the statute's applicability turned on the happenstance of the speed with which the trial judge was able to make a decision. In addition, and again unlike *Porter*, the triggering decision in this case related only to an adjustment to the amount of a liability whose existence was fixed years before either the making of the decision or the passage of the statute altering the rate of prejudgment interest.

Furthermore, in addition to being arbitrary as applied in this case, the Rhode Island statute as applied here serves no rational basis. Traditionally, two rationales have been advanced in support of statutes imposing prejudgment interest. First, it has been said that such statutes encourage settlement of disputes by removing an inducement for delay. *See*, Opinion below (App. IA, 446 A.2d at 757). Second, such statutes have been held to compensate a prevailing party for the delay in realizing a benefit from a cause of action. *Id.* Neither rationale has any application in this case. First, because the statute raising the prejudgment interest rate from 8% to 12% became effective years after the essential issues in this case were tried and finally resolved and weeks after the conclusion of the third and final round of hearings before the trial court, and because Bethlehem could not foresee that the statute would be enacted, the statute increasing the rate of interest clearly could not significantly encourage settlement. And because the retroactive application of the statute from the date of accrual of the cause of action would have the effect of applying the 12% rate to a period of time when the prime rate of interest was, in general, far

below 12%,[8] such application of the statute is not necessary to compensate the Authority for delay, but rather would result in a windfall to it.

As applied to Bethlehem in this case, then, the statute increasing the rate of prejudgment interest is without a rational basis. This absence of a rational basis, together with the peculiar caprice of permitting a decision of such immense practical import to turn on the happenstance of the speed with which a court is able to make a decision, distinguishes the Due Process issue in this case from the Due Process issue in *Funkhouser v. Preston Co.*, 290 U.S. 158 (1933), which is cited by the Supreme Court of Rhode Island in support of the decision from which this appeal is taken, and in which this Court rejected what appears to have been a general constitutional attack upon a New York statute permitting addition of interest to judgments for unliquidated sums. The Rhode Island statute raising the prejudgment interest rate to 12% is, as applied here, irrational, punitive, capricious, and consequently violative of the Fourteenth Amendment's Due Process Clause.

III. The Interference with Settled Expectations.

The other constitutional infirmity of the decision from which this appeal is taken is the unwarranted and irrational

[8] The average prime rate of interest charged by banks on short term business loans for the years 1970 through 1980 was as follows:

1970 - 7.91%	1971 - 5.72%	1972 - 5.25%	1973 - 8.03%
1974 - 10.81%	1975 - 7.86%	1976 - 6.84%	1977 - 6.83%
1978 - 9.06%	1979 - 12.67%	1980 - 15.25%	

Bankers Desk Reference, 1982 Yearbook, p. 210, Table 3.10 (Warren, Gorham & Lamont, 1982).

As these figures show, the Prime Rate exceeded 10% in only one of the years between 1970 and 1978. The decision of the courts below, however, would award interest to the Authority at the rate of 12% for each year since 1970.

upsetting of settled expectations visited upon Bethlehem by the retroactive application of Chapter 54, Section 1 of the 1981 Public Laws of the State of Rhode Island to the full amount of the judgment against Bethlehem from the date of accrual of the Authority's cause of action.

The very essence and spirit of the Contract Clause of Article I, section 10 of the United States Constitution is the prohibition upon state interference with settled economic expectations. The same principle is embodied in the Due Process Clause. While the prohibition is not absolute, nonetheless, as this Court stated in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978), "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relations, even in the exercise of its otherwise legitimate police power." (emphasis in original).

The basic teaching of the *Spannaus* case and of the Contract Clause and Due Process Clause decisions that preceded it is that the constitutionality of a state law that substantially disturbs settled economic expectations is dependent upon the following factors:

1. whether the legislation is enacted in response to any emergency;

2. whether the legislation "was enacted to protect a basic societal interest, not a favored group," *Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at 242;

3. whether the relief is "appropriately tailored to the emergency that it was designed to meet," *id.*;

4. whether the "imposed conditions [are] reasonable," *id.*; and

5. whether "the legislation [is] limited to the duration of the emergency."

Id.

Recent decisions have expanded the scope of inquiry where the constitutionality of retroactive legislation has been challenged, with some courts holding that a general consideration of the equities of retroactive application of legislation should inform a decision as to such legislation's validity.

In *Nachman Corp.* v. *Pension Benefit Guaranty Corp*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), the United States Court of Appeals for the Seventh Circuit held that in assessing the constitutionality of legislation that imposes retroactive burdens, the judicial task is to compare "the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." 592 F.2d at 960. In performing that task, according to the Seventh Circuit, courts should be guided by the following four factors: "the reliance interests of the parties affected . . . whether the impairment of the private interest is effected in an area previously subjected to regulatory control . . . the equities of imposing the legislative burdens . . . and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Id.* In its decision affirming the Seventh Circuit's decision, this Court, while not expresaly sanctioning the Seventh Circuit's analytical approach, carefully considered the equities of retroactive application of the legislation involved in the case. 446 U.S. 359 (1980).

Lower courts have adopted the Seventh Circuit's analysis in *Nachman*. In *Shelter Framing Corp.* v. *Carpenters Pension Trust for Southern California*, ___ F. Supp. ___, 51 U.S.L.W. 2056 (C.D. Cal., July 9, 1982), for instance, the District Court, applying the Seventh Circuit's analysis, invalidated the Multi-Employer Pension Plan Amendments Act, 29 U.S.C. § 1381 *et seq.*, focusing particularly on the reliance interests involved and on the equities of retroactive application of the statute involved.

In the wake of the *Spannaus* and *Nachman* cases, there is at least some confusion as to the proper scope of inquiry in a

case in which the validity of retroactive legislation is challenged. While *Spannaus* appears to mandate a rather narrow focus upon the necessity of applying legislation retroactively and the extent to which the legislation is tailored to meet the necessity, *Nachman* suggests a somewhat broader inquiry into the equities of imposing burdens retroactively. In view of the frequency of challenges of this nature and the importance of the legislation that is often affected by such challenges, more precise guidance from this court is required. The present case brings the issues relating to the constitutionality of retroactive legislation into sharp focus, and presents this court with an opportunity to clarify the proper mode of analysis of this important issue. *Cf.*, *Van Emmerik* v. *Janklow*, U.S. Supreme Court Docket No. 81-293, *appeal dismissed*, 50 U.S.L.W. 3546 (White, J., and Blackmun, J., dissenting from dismissal of appeal).

IV. Application of *Spannaus* and *Nachman* to this Case.

Under both the *Spannaus* and *Nachman* approaches, the lower courts' retroactive application in the present case of Chapter 54, Section 1 of the 1981 Public Laws of the State of Rhode Island is unsustainable.

That the Supreme Court of Rhode Island's retroactive application of Chapter 54, section 1 of the 1981 Public Laws of Rhode Island interferes substantially with Bethlehem's settled economic expectations is beyond cavil. At least as early as August, 1977, when the Supreme Court of Rhode Island affirmed the fundamental holding of the Superior Court that Bethlehem had breached its contract with the Authority, the essential aspects of Bethlehem's liability for breach of contract were firmly fixed, and a key element of this liability was prejudgment interest calculated at the rate of 8% from accrual of the action. Moreover, Bethlehem relied upon its ex-

pectation concerning its maximum liability exposure; had it known that an increased rate of prejudgment interest might be applied to the entire judgment, Bethlehem might well have proceeded differently in the subsequent stages of the litigation. (The Authority, conversely, had no expectation that its judgment would be increased by nearly one million dollars by a change in the rate of prejudgment interest. The legislative change is nothing more than a windfall for the Authority).

Chapter 54, Section 1 of the 1981 Public Laws of Rhode Island, as applied by the courts below, therefore substantially abridges Bethlehem's settled expectations. Under the approach outlined by this Court in *Spannaus*, then, the law's validity under the Contract Clause turns on the factors set forth in that case. Application of these factors leads ineluctably to the conclusion that, as applied in this case, Chapter 54, section 1 of the 1981 Public Laws of Rhode Island violates the Contract Clause.

First, and most obviously, the measure at issue here was not passed in response to an emergency. The legislative language does not suggest as much, and the legislation, by its nature, is not emergency legislation.

In addition, as discussed earlier, the legislation, as applied here, serves no rational purpose. Since all trial court proceedings were completed before the statute's effective date, and because the basic liability adjudicated in the case was settled years before enactment of the statute, the statute, as applied, cannot be justified as a means of encouraging settlement. And because the statute, as applied, bestows upon the Authority a windfall far in excess of the amount needed to compensate the Authority for delay in obtaining judgment, the statute cannot be justified as providing reasonable compensation for delay. As applied, then, the State cannot be characterized as either "necessary" or "reasonable." *See, United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

Against the substantial interference with expectations that is worked by the statute, there is no substantial state interest in applying the statute in the manner applied by the courts below to be weighed. The statute thus abridges Bethlehem's settled economic expectations for no reason. This is the essence of an unreasonable interference with settled expectations that the Contract Clause and the Due Process Clause forbid.

Application of the broader analysis suggested by the Seventh Circuit in *Nachman* yields the same conclusion. As noted, Bethlehem relied on the eight percent (8%) rate from at least as early as August, 1977 in assessing the maximum liability to which it was exposed. The Authority, on the other hand, could not reasonably have relied on the hope of a windfall in the form of a fully retroactive increase in the rate of prejudgment interest.

In addition, the equities of the case clearly favor Bethlehem with respect to the interest rate issue. If the decision of the lower court is permitted to stand, Bethlehem will be penalized (and the Authority will enjoy a windfall) because of the happenstance that a decision following the final round of hearings before the trial court was not entered within six weeks after conclusion of the hearings. The statute, as applied by the lower courts, simply takes money from Bethlehem and gives it to the Authority.

Nor does resort to the elusive distinction between remedial and substantive rights remove from this case the taint of constitutionally impermissible interference with settled economic expectations. While that distinction has in some cases been used as a tool to sweep away the need for reasoned legal analysis, it has more recently been recognized as a confusing formalism that prevents rather than assists reasoned analysis.

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), this Court struck down as violative of the Contract Clause a

New York law that repealed a statutory covenant designed to protect holders of bonds issued by the New York Port Authority; in this Court's view the statute worked an unreasonable and unnecessary—and hence unconstitutional—abridgement of the rights of the bondholders. With respect to the distinction between statutes affecting substantive rights and those affecting "merely" remedies, this Court described the "remedy/obligation distinction" as "now largely an outdated formalism." 431 U.S. at 20, n.17. *See also*, *Porter* v. *Clerk of Superior Court*, 368 Mass. 116, 330 N.E.2d 206, 208 (1975) ("We [have chosen] not to rely on the substantive/procedural distinction and instead [have] attempted to formulate a more workable rule").

Presumably even a court wedded to the remedy/obligation or substance/procedure distinction would pause before dismissing as "merely remedial" a constitutional attack upon a retroactive law raising the rate of prejudgment interest to, say, 30%. Yet the violence done here to Bethlehem's settled expectations is as great as would be done in a typical case by a retroactive hike in the prejudgment interest rate to thirty percent. Bethlehem was held guilty of a breach of contract in 1975, a finding upheld by the highest court of the State of Rhode Island in 1977. While Bethlehem and the Authority continued thereafter to litigate the collateral issue of the amount of credit due Bethlehem for painting work actually performed, Bethlehem's basic obligation to the Authority was settled in 1977. A crucial element of the obligation was prejudgment interest at the rate of 8% as prescribed by Rhode Island law. Nearly four years later, the State of Rhode Island passed a law raising the prejudgment interest rate to 12% and purporting to apply the new rate retroactively from the date of accrual of the Authority's cause of action, even though Bethlehem's obligation to the Authority had been firmly fixed since 1977, thus adding nearly a million

dollars to Bethlehem's liability to the Authority. The result offends the fundamental principles embodied in the Contract Clause of Article I, section 10 of the United States Constitution and in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. To sweep the important constitutional issues involved in this case behind the shield of the substance/procedure distinction is to mask a serious and important constitutional violation with a semantic nicety. The constitutional issues raised by this appeal are extremely important to the litigants in this case and to the orderly development of constitutional law, and they demand the attention of this Court.

Conclusion.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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